

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE ELBERT MATTHEWS,

Defendant-Appellant.

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UNPUBLISHED

May 29, 1998

No. 198413

Kalamazoo Circuit Court

LC No. D-95-0802-FH

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of delivery less than 50 grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to 18 months to 40 years' imprisonment as a third offense habitual offender. He appeals as of right. We affirm.

Defendant was charged with selling cocaine to a Kalamazoo Valley Enforcement Team (K-VET) informant, Jeffrey Leeger, during three controlled buys: two on February 13, 1995 at 1111 North Rose Street and one on February 20, 1995 at 1427 Portage Road, both in Kalamazoo.

Defendant first argues that the prosecutor erred when he questioned defense witness Morris Whitley about two prior drug-related offenses. Although defendant initially frames this issue as one of prosecutorial misconduct, the issue actually deals with the admissibility of the evidence. The challenged testimony is an exchange between the prosecutor and the witness on recross examination. During defense counsel's redirect examination, Whitley denied having been previously charged with operating a drug house. On recross examination, the prosecutor elicited testimony from Whitley admitting that he had been charged with that offense and had pled guilty to the lesser offense of possession of cocaine. Defendant contends that this line of questioning was inadmissible under MRE 609 and therefore improper.

Defendant failed to preserve this issue because he did not enter a timely objection to this evidence at trial. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Even if

defendant had properly preserved this issue, we would find that no substantial right of defendant's was affected because defense counsel originally elicited the testimony, opening the door to the questions asked by the prosecutor with regard to the charges the witness had faced and his guilty-plea conviction. MRE 103(a)(1); *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

Next, defendant argues that the prosecutor's closing argument to the jury was improper because he improperly vouched for the truthfulness of his witnesses, denigrated the defendant and his defense, shifted the burden of proof to defendant, and argued facts not in evidence. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The prosecutor's remarks, even if objectionable, could certainly have been cured by a proper instruction from the trial court. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Moreover, the prosecutor was not personally vouching for the witnesses' credibility, but rather was arguing from the facts that certain witnesses were or were not worthy of belief, which is permissible. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Furthermore, defendant has failed to argue how facts not in evidence were introduced into the prosecutor's closing argument. Because no miscarriage of justice would occur if this issue is not reviewed, we decline to consider it further.

Defendant next argues that the trial court's supplemental instructions given in response to the jury's question regarding deadlock resulted in a coerced verdict. However, defendant did not object to these supplemental instructions at the time they were given, and therefore this issue, as well, is unpreserved for review by this Court. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Moreover, there was nothing improper about the court's instructions. Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered. *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). The court's instructions made it clear that though it would not consider this jury to be hung after only four hours of deliberations, there was no specific time limit by which the jury could judge whether it was deadlocked, and that this determination would be within the court's discretion. The court did not thereafter require the jury to deliberate for an unreasonable length of time before ultimately declaring the jury to be deadlocked. The court also responded to the jury's question that it could reach a verdict with respect to some counts but not with respect to others. However, the court did not imply that the jury must reach a verdict at all costs or that some jurors should sacrifice their personal beliefs in order to accomplish this goal. See *People v Pollick*, 448 Mich 376, 386-387; 531 NW2d 159 (1995). Therefore, the trial court's instructions to the jury did not result in a coerced verdict.

Next, defendant argues that the jury verdict of acquittal on two counts of delivery of cocaine (by virtue of a mistrial after the jury was deadlocked) and guilty on a third count was inconsistent with the evidence, a product of a misunderstanding of the jury instructions, and/or constituted an impermissible compromise verdict. Defendant contends that the sole issue was whether the informant was credible in the eyes of the jury. If the jury believed him, it should have convicted defendant on all counts, but if the

jury did not believe him, it should have acquitted on all counts. Because this was not the result, defendant argues that the jury must have misunderstood the court's instructions or improperly reached a compromise verdict.

This is a question of law which is reviewed de novo by this Court. *Oakland Hills v Leuders Drain*, 212 Mich App 284, 294; 537 NW2d 258 (1995). Our Supreme Court has held that the credibility of an informer who is an addict, as Leeger was, is a jury question, and that the jury may convict on the basis of that testimony alone. *People v Atkins*, 397 Mich 163, 172; 243 NW2d 292 (1976). The jury in this case viewed the credibility of the witnesses, including the informer, and made its decision based on the instructions given by the court. The trial court properly instructed the jury that it should use its common sense and everyday experience in deciding whether to believe a witness, and that it could consider whether the witness was able to see and hear clearly, how long the witness was watching or listening, whether or not the witness was distracted, whether the witness had a good memory, the witness' demeanor and actions while testifying, the witness' maturity, whether the witness seemed to be making an honest effort to tell the truth, any of the witness' biases, and any special reasons why the witness may be more or less likely to tell the truth. Absent any specific evidence that the integrity of the process was somehow diminished, this Court will not second guess the jury in its judgment of the credibility of witnesses. We therefore find nothing improper in the verdicts.

Finally, defendant contends that the trial court erred in sentencing defendant as a third habitual offender under MCL 769.11; MSA 28.1083, rather than under the controlled substances act, MCL 333.7413(2); MSA 14.15(7413)(2). The Michigan Supreme Court has held that the "shall be punished as provided" language in the controlled substances act, MCL 333.7413(3); MSA 14.15(7413)(3), does not mean that a sentencing judge may not impose a greater sentence under the habitual offender provisions. *People v Primer*, 444 Mich 269, 275; 506 NW2d 839 (1993). This Court has held that it is within the prosecutor's discretion to proceed pursuant to either sentence enhancement statutes in an appropriate case. *People v Sears*, 124 Mich App 735, 742; 336 NW2d 210 (1983).

In the present case, the prosecutor did not proceed, nor did the trial court sentence pursuant to *both* the controlled substance act and the habitual offender act. Thus, the cases cited by defendant in support of the proposition that it is improper to proceed under both statutes are inapplicable to this issue. Ultimately, defendant was sentenced only as a third offense habitual offender, and defendant's sentence was enhanced accordingly. Accordingly, the court did not err in sentencing defendant under the habitual offender act pursuant to MCL 769.11; MSA 28.1083.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kathleen Jansen

/s/ Hilda R. Gage